09/08/03

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

REMINGTON COVINGTON HOTEL, LP [1]/

Employer

and Case 9-RC-17515

HOTEL EMPLOYEES RESTAURANT EMPLOYEES
UNION, LOCAL 12, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, [2]/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section (2), (6) and (7) of the Act.

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[1]/ The Employer's name appears as amended at the hearing.

[2]/ I have given full and careful consideration to the timely received brief of the Employer in reaching my findings and conclusions in this matter. The Petitioner did not submit a brief.

5. The Employer, a corporation, operates a hotel in Covington, Kentucky where it employs approximately 96 to 105 employees in the unit found appropriate. There is no history of collective bargaining affecting any of the employees involved in this proceeding.

The Petitioner seeks to represent a unit comprised of all full-time, regular part-time and on-call bartenders, front desk associates, night auditors, drivers, housekeepers, dishwashers (sanitation aides), bellmen, servers, busers, banquet set up, banquet bartenders, banquet servers, banquet captains, maintenance employees, engineers, cooks, laundry, pantry, sales secretary, junior accounting clerks, reservation supervisor, purchasing agent, front office supervisor, floor supervisor (housekeeping), cashiers, and hosts employed by the Employer at its Covington, Kentucky facility, excluding all managerial employees, all employees furnished by supplier employers, and all guards and supervisors as defined in the Act. Contrary to the Petitioner, the Employer, seeks to exclude from the petitioned for unit approximately 12 part-time employees who average less than 20 hours a week and 9 on-call employees on the basis that those employees lack a community of interest with the other unit employees. Additionally, the Employer would exclude Assistant Executive Housekeeper Erica McPeak and Floor Supervisor Cathy McGohan from the proposed unit on the ground that they are supervisors within the meaning of Section 2(11) of the Act. The Petitioner contends that McPeak and McGohan are not statutory supervisors and seeks their inclusion in the unit. Finally, the Employer appears to contend that it is a joint employer with a labor supplier employer, referred to in the record only as Srass, and that any unit must include the eight temporary housekeeping department employees supplied to it by Srass. The Petitioner would exclude the supplied employees from the unit as temporary employees who lack a community of interest with the employees employed solely by the Employer. The Petitioner has expressed a willingness to proceed to an election in any unit found appropriate.

Srass was not named in the petition, was not provided with notice of the hearing, and did not participate. The Board has held, however, that where a labor organization seeks to represent a bargaining unit consisting only of the employees of a single user employer that it, "will not require the naming of all potential joint employers and the litigation of their potential relationship with the user employer." *Professional Facilities Management, Inc.,* 332 NLRB No. 40 (2000). The Petitioner has taken the position that such supplied employees, in any event, should be excluded from the unit. Under such circumstances, it cannot be argued that lack of notice to Srass resulted in prejudice to any party. *Professional Facilities Management, Inc.,* supra.

I. THE EMPLOYER'S OPERATION:

General Manager John P. Keller is in charge of the day-to-day operation of the Employer's Covington, Kentucky hotel and is the highest ranking manager onsite. Reporting to Keller are: Mike Scavo, food and beverage director; Chuck Krebiehl, chef; Darellton Moorseby, restaurant manager; Amy Medford, restaurant manager; Aime Fielding, human resource director; Tina Smiley, executive housekeeper; Mike Montifoglio, front office manager; Theresa Vetter, banquet manager; Shelly Riddle, sales and catering manager; Heather Rodgers, sales and catering manager; Teri Reiersman, sales manager; Stacey Manice, sales manager and the controller, a currently vacant position. The parties stipulated, and the record shows that the above-noted managers and supervisors have the authority to hire and discipline employees or to effectively recommend such action or to effectively direct employees' work in a manner requiring the use of independent judgment and are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit.

The Employer's hotel is open around-the-clock, 365 days per year. It consists of a single facility located in Covington, Kentucky with 236 guestrooms, 18 floors above ground, and a lower level. The Employer first began operating the hotel on about November 21, 2000, after purchasing it from the Clarion Hotel, its prior owner. Guests who park in the Employer's garage enter the facility through a lower lobby. Registration, check-in and checkout functions take place at the front desk, which is located off of the main lobby on the first floor just above the lower lobby. An indoor swimming pool, ballroom, kitchen, one of the hotel's two restaurants, guest restrooms, telephone banks, and the executive offices are also located on the first floor. A second kitchen is located on the 18th floor and services the Employer's second restaurant, which is also located on that floor. The Employer's 16th floor is devoted to meeting spaces and has eight separate rooms for that purpose.

The Employer's employees work in several different departments. Front Office Manager Mike Montifoglio is in charge of the front desk area. He immediately supervises all of the front desk associates and reservationists, van drivers, and bellmen. The night auditors are on the front desk schedule but report directly to the controller's office in the accounting department. The accounting department also includes the controller and junior accounting clerks. The Employer's maintenance department includes three classifications of engineers and is overseen by Keller as the position of chief engineer is currently vacant. Executive Housekeeper Tina Smiley is in charge of the housekeeping department, which includes laundry employees, housemen, and room attendants. Food and Beverage Director Mike Scavo is in charge of the food and beverage department, which includes the two restaurants, kitchens, and the banquet department. Employee classifications in the restaurants include servers, busboys, cooks, pantry cooks, and dishwashers (sanitation aides). There is also a purchasing agent classification in the kitchen. The banquet department is immediately supervised by Banquet Manager Theresa Vetter, who reports to Scavo, and includes the employee classifications of housemen, servers, bartenders, and banquet captains. Junior managers Mooresby, Medford, and Chef Krebiehl also report to Scavo. The Employer's sales department is headed by a director of sales, a currently vacant position, the duties of which are being handled by Keller. The employees in the sales department include the sales and catering managers and the executive secretary.

The Employer classifies its employees based on the number of hours they work and whether they are regularly scheduled for hours, as status 1, 2, 3, and on-call employees. Status 1 employees are full-time employees, whom the Employer characterizes as those employees who work 30 hours or more a week. There are approximately 50 such employees. Status 2 employees are part-time employees who work between 20 and 29 hours a week and Status 3 employees are part-time employees who work less than 20 hours a week. There are approximately 34 Status 2 employees and approximately 12 status 3 employees. Finally, there are about nine on-call employees who are scheduled on an as needed basis, primarily in the banquet department.

The Employer's hiring process, and discipline and discharge decisions are centrally controlled through its corporate or local human resources departments. All the Employer's employees undergo a 120-day orientation or probationary period and receive annual performance appraisals. All hourly employees employed by the Employer punch a time clock in the employee cafeteria or a time clock located in the housekeeping department. Both clocks are linked to a main accounting clock.

All the employees exclusively employed by the Employer are entitled to receive or participate in its ESIP retirement savings program, use of the employee cafeteria, employee discounts, overtime pay, leaves of absence, military leave, jury duty, an employee meal plan, [3/] employee parking, room discounts, employee of the month and year, reporting pay, fair treatment and open communication policies, employee uniforms, and on the job training. There are some additional benefits unique to only Status 1 employees. Said benefits include: paid vacation time, holiday pay, paid funeral or bereavement leave, sick time, and health and dental insurance coverage.

All the employees employed exclusively by the Employer, regardless of department, are paid on the same wage scale with higher pay linked to length of service with the Employer from the employee's start date regardless of hours actually worked. In this regard, the Employer has a starting wage, a 120-day wage, a year-to-year increase wage, and a maximum wage rate. The record does not disclose the range of the Employer's wage scale. Additionally, the record does not disclose the hourly rate of pay received by the housekeeping department employees supplied through Srass. However, the record reflects that the Employer pays $9 an hour to Srass for each hour worked by the Srass supplied employees. Srass then pays the supplied employees an unspecified hourly wage.

II. SUPPLIER EMPLOYEES:

With regard to the Srass supplied housekeeping employees, the record discloses that the Employer's employee handbook is applicable to them and that they share common day-to-day supervision with those employees exclusively employed by the Employer. In this connection, it is undisputed that Executive Housekeeper Smiley supervises all employees employed in the housekeeping department, including those furnished by Srass. Additionally, the supplied employees punch a time clock and generally have the same starting and ending hours as those employees in the housekeeping department who are exclusively employed by the Employer. The supplied employees average 25 hours or more a week. The Employer does not have any input into the identity of the employees that Srass initially determines to supply to the Employer. However, if the Employer becomes dissatisfied with the performance of any of the supplied employees it can advise Srass that it does not wish any such employees to return and their employment with the Employer will cease. Indeed, the Employer ceased to employ two supplied employees when it notified Srass that they were no longer to report to the Employer because of poor attendance issues.

Srass does not have any supervisors or representatives at the Employer's facility and apparently does not have any contact with these employees on a daily basis. The Employer collects the time records for these employees which it forwards to the supplier employer to compute their pay. It appears that all of the supplied employees are from foreign nations who are in this country on work permits. Srass provides workers' compensation coverage for the supplied employees and is apparently responsible for applicable tax withholding. The record reflects, however, that the Employer is unaware of what other benefits Srass provides to the supplied employees. The benefits provided by the Employer for the supplied employees are limited to uniforms, a lunch break, receipt of the employee newsletter, eligibility for an employee discount, and the employee meal plan.

[3/] Employees receive a meal supplied at no cost to them by the Employer if they work a shift of 4 hours or more in duration.

The supplied employees work almost exclusively in the Employer's housekeeping department. However, they may occasionally be utilized to wash dishes and to perform exterior maintenance work such as spreading mulch and picking up debris in the parking lot. While working in the housekeeping department the supplied employees perform room attendant (housekeeper) duties, work in the laundry, or function as house aides. About six of the supplied employees work primarily as room attendants and are responsible for cleaning and maintaining guestrooms. One of the supplied employees works primarily in laundry and is responsible for retrieving laundry, sorting, washing, drying, pressing, folding linens and other hotel laundry, and placing it on the shelves for use. Another of the supplied employees works as a house aide and is primarily responsible for cleaning the public areas, emptying trash, sweeping and mopping floors, cleaning offices and bathrooms, and dusting and polishing woodwork. In carrying out the above assignments, the supplied employees perform the same housekeeping department duties as the employees in that department who are employed exclusively by the Employer.

The record discloses that the eight supplied employees currently working at the Employer's facility have worked at that location for about a year and a half and that there are no immediate plans to discontinue their services. The record further reflects, however, that once the Employer has hired a sufficient number of its own housekeeping personnel, that it plans to phase out the daily use of Srass supplied employees. [4/] Currently, the Employer ensures that its own employees have adequate hours of work before assigning hours to the supplied employees. No Srass-supplied employee has ever been subsequently hired by the Employer. However, the record discloses that one of these supplied employees recently obtained United States citizenship through marriage and is in the process of applying for employment with the Employer.

Although the Employer never makes an express claim, it appears to maintain at hearing and in brief that it is a joint employer with Srass of the employees whom Srass supplies for work. The Petitioner also did not explicitly take a position on the joint employer issue, but maintains that, in any event, the contract employees should be excluded from the unit as temporary employees who lack a community of interest with the petitioned-for employees. The agreement between the Employer and Srass is an oral agreement and is rather informal in nature. In fact, the record discloses that the arrangement for the supply of these employees was apparently reached between Executive Housekeeper Smiley and a representative of Srass who is identified in the record only as Sergei. The supplied employees had also worked under the direction of Smiley at her previous employer.

Under Board precedent, to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment of "jointly employed" employees. *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). See also, *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3rd Cir. 1982). Such employers must jointly and meaningfully affect matters relating to the employment relationship of the joint employees, such as hiring, firing, disciplining, supervising and directing. *Riverdale Nursing Home*, 317 NLRB at 882; *TLI, Inc.,* 271 NLRB 798 (1984). Here, the Employer assigns, directs, and oversees the daily work of the employees supplied by Srass.

[4/] I find as a result of the indefinite tenure of the supplied employees that their eligibility to vote is not adversely affected as a result of their "temporary" status. See, *Personal Products Corp.*, 114 NLRB 959 (1955); *United States Aluminum Corp.*, 305 NLRB 719 (1991). However, as discussed in the Decision, I have excluded them based on an examination of traditional community of interest criteria.

Moreover, the supplied employees perform the same duties, wear the same uniforms and share the same employee facilities as the employees exclusively employed by the Employer. The Employer monitors the time worked by the supplied employees and can have the employees removed from its service. On the other hand, Srass is responsible for hiring such employees, paying their wages, paying for their workers' compensation, and apparently for deducting taxes. Under such circumstances, it is apparent that the Employer and the supplier employer affect and codetermine essential terms and conditions of employment of the supplied employees. Accordingly, in agreement with the apparent position of the Employer, I find that the Employer is a joint employer with Srass for the employees furnished the Employer by Srass. *Riverdale Nursing Home,* 317 NLRB at 882; *TLI, Inc*., supra.

Having found that the Employer is a joint employer with Srass, I must consider whether the jointly employed employees supplied by Srass must be included in the unit with the employees exclusively employed by the Employer. The Employer maintains that the supplied employees must be included in the unit with its solely employed employees. On the other hand, the Petitioner contends that the supplied employees are properly excluded from the unit of the Employer's own employees whom the Petitioner seeks to represent.

In *M.B. Sturgis, Inc., et al.,* 331 NLRB No. 173 (2000), the Board recently addressed the question of "whether and under what circumstances employees who are jointly employed by a 'user' employer and a 'supplier' employer can be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer." For many years, prior to *Sturgis*, the Board considered units comprised of jointly employed employees and exclusively employed employees of one of the joint employers to constitute multi-employer bargaining and consequently declined to combine such employees in the same unit absent the consent of all the employers. *Greenhoot, Inc.,* 205 NLRB 250 (1973); *Lee Hospital*, 300 NLRB 947 (1990). See also, *Hexacomb Corporation*, 313 NLRB 983 (1994). In *Sturgis*, the Board noted that *Greenhoot* stands only for the proposition that where two or more user employers obtain employees from a supplier employer, a bargaining unit comprised of all the employees of the user and supplier employers is multi-employer and requires the consent of the respective employers. In *Lee Hospital*, the Board extended the *Greenhoot* multi-employer concept to include situations where a single user employer obtained employees from one or more supplier employers.

In *Sturgis*, the Board recognized the importance of supplied and contract labor in today's "contingent work force." Thus, the Board, in *Sturgis*, reaffirmed *Greenhoot* insofar as it requires employer consent for the creation of true multi-employer units involving separate user employers. However, the Board held that *Lee Hospital* was erroneously decided and as a consequence, numerous employees, as part of the contingent work force, had been denied representational rights under the Act. *M.B. Sturgis, Inc., et al.,* 331 NLRB No. 173 slip op. at 1. Thus, the Board overruled *Lee Hospital*. *M.B. Sturgis, Inc.,* et al., 331 NLRB No. 173 slip op. at 8. In overruling *Lee Hospital*, the Board, in *Sturgis*, found the fact that a single user employer obtains employees from one or more supplier employers does not establish a true multi-employer relationship and that such supplied employees may be properly included in a unit with the user employer's solely employed employees without the consent of any of the employers. *M.B. Sturgis, Inc., et al.,* 331 NLRB No. 173 slip op. at 8-9. See also, *Professional Facilities Management, Inc*., supra, as well as pre-*Greenhoot* decisions in *Louis Pizitz Dry Goods Co.,* 71 NLRB 579 (1946); *Taylor's Oak Ridge Corporation*, 74 NLRB 930 (1947); *Stack & Company,* 97 NLRB 1492 (1952); cited with approval by the Board in *Sturgis*. Moreover, in

reaffirming the general principles of *Greenhoot*, the Board clarified that decision to make clear that an overall unit of the employees of a supplier employer could be appropriate regardless of the number of user employers to whom such employees may be assigned. *M.B. Sturgis, Inc.,* et al., 331 NLRB No. 173 slip op. at 11.

Although the Board, in *Sturgis*, found that jointly employed and solely employed employees of a single user employer, like here, could be included in the same unit, it specifically noted that it did not intend to suggest that every unit combining both groups of employees would be found appropriate. *M.B. Sturgis, Inc., et al.,* 331 NLRB No. 173 slip op. at 9. The Board held that its traditional community of interest factors must be applied in determining the appropriateness of units in which a party seeks to include both jointly supplied employees and the solely employed employees of a user employer. *M.B. Sturgis, Inc., et al*., 331 NLRB No. 173 slip op. at 12.

As the Board instructed in *Sturgis*, I have applied the standard community of interest criteria in determining whether the jointly employed employees here, as contended by the Employer, must be combined in the same unit with its regular employees whom the Petitioner seeks to separately represent. The traditional community of interest test examines a variety of factors to determine whether a mutuality of interest in wages and working conditions exist among the employees in question. *Kalamazoo Paper Box*, 136 NLRB 137 (1962); *Swift & Company*, 129 NLRB 1391 (1961). In analyzing community of interest among employee groups, the Board considers bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. *J.C. Penney Company*, 328 NLRB No. 105 (1999); *Armco, Inc.,* 271 NLRB 350 (1984).

In *Kalamazoo*, the Board stated:

> Because the scope or unit is basic to and permeates the whole collective bargaining relationship, each determination, in order to further effective expression of the statutory provisions, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered. Id. at 137. Accord: *Gustave, Inc*., 257 NLRB 1069 (1981).

Thus, when the interests of one group of employees are dissimilar from those of another group, the employees need not be combined in a single unit. *Swift & Compan*y, supra. However, the fact that two or more groups of employees may have some different interests does not render a combined unit inappropriate if there is a sufficient community of interest among all of the employees. *Berea Publishing Co.,* 140 NLRB 516, 518 (1963). See also, *Brand Precision Services*, 313 NLRB 657 (1994).

In applying the community of interest test to determine the scope and composition of bargaining units, the Board has consistently held that Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining and that there is nothing in the statute which requires that the unit for bargaining be

the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Co*., 91 NLRB 409, 418 (1950). The Act requires only that the unit sought be appropriate for the purposes of collective bargaining. *National Cash Register Company*, 166 NLRB 173 (1967). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Dezcon, Inc*., 295 NLRB 109 (1989). Although a combined unit of the supplied employees and the Employer's exclusively employed employees may be appropriate, it does not, ipso facto, render a unit compatible to the one sought by the Petitioner inappropriate. *Overnite Transportation Company*, supra.

The record here clearly discloses that the jointly employed employees share some interests with the solely employed employees of the Employer whom the Petitioner seeks to represent. For example, the eight housekeeping department employees supplied by Srass work side-by-side with employees exclusively employed by the Employer. The supplied employees perform the identical work under the same supervision and working conditions as the Employer's regular employees. All housekeeping department employees, regardless of whether they are jointly or solely employed by the Employer, work essentially the same hours and are scheduled in the same manner by common supervision. The supplied employees are apparently assigned exclusively to the Employer and wear the same uniforms as the Employer's exclusively employed employees. Additionally, the Employer may impose discipline on the supplied employees and it monitors their time, which it forwards to Srass for payroll purposes.

Although the above factors establish that the jointly employed and solely employed employees of the Employer have many common interests, it is undisputed that there are some major differences in their terms and conditions of employment. For example, the jointly employed employees are hired by Srass without any input by the Employer. Srass establishes and controls the wages received by the supplied employees and such employees continue to be carried on Srass' payroll. Srass is also responsible for all taxes and workers' compensation for the supplied employees. Unlike the full-time employees, the supplied employees do not receive substantial fringe benefits from the Employer such as health insurance and participation in an Employer match retirement plan. Moreover, the record does not disclose whether Srass provides these employees with any benefits. Although the Employer can have jointly employed employees removed from service, it is solely the responsibility of Srass to discharge the supplied employees. Finally, no supplied employee has ever become a regular employee of the Employer. Indeed, it does not appear from the record that the supplied employees are even considered for regular employment by the Employer unless they become citizens of the United States.

Weighing all the existing factors, I am of the opinion that there are sufficient dissimilarities between the two groups of employees to warrant a finding that the employees employed solely by the Employer constitute an appropriate unit. *Overnite Transportation Company*, supra; *United Stores of America*, 138 NLRB 383 (1962). Thus, the Petitioner may represent the Employer's solely employed employees in a separate unit. *Overnite Transportation Company*, supra.; *M.B. Sturgis, Inc., et al.,* supra. In reaching this decision, I note that the supplied employees here are almost identical to such employees whom the Board excluded from a unit of exclusively employed employees in *Lodgian, Inc. d/b/a Holiday Inn City Center*, 332 NLRB No. 128 (2000).

I do not agree with the Employer's suggestion in its brief that the Board's decision in *M.B. Sturgis, Inc., et al.,* supra, compels the inclusion of the supplied employees in the proposed unit. Although the supplied employees here have many interests in common with the Employer's exclusively employed employees and a unit of the combined employees may well be appropriate for purposes of collective bargaining, *Sturgis* does not compel inclusion of jointly employed employees in a unit of solely employed employees. Rather, it provides that the Board's traditional community of interest factors should be applied in making such unit determinations. Applying such factors, I have determined that the Employer's solely employed employees, excluding the supplied employees, constitutes an appropriate unit for purposes of collective bargaining. See *Lodgian, Inc. d/b/a Holiday Inn City Center*, supra.

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that a unit limited in scope to the Employer's solely employed employees is appropriate for the purposes of collective bargaining. *Lodgian, Inc. d/b/a Holiday Inn City Center*, supra; *Overnite Transportation Company*, supra; *United Stores of America*, supra; *M.B. Sturgis, Inc., et al*., supra. Accordingly, I shall exclude the employees supplied to the Employer by Srass from the unit.

III. PART-TIME AND ON-CALL EMPLOYEES:

The record discloses that the Employer employs approximately 12 part-time employees who work less than 20 hours a week (Status 3). These employees are eligible to receive the same limited benefits as are received by the part-time employees who work 20 to 29 hours a week and whom the Employer agrees should be included in the unit. Some of the Status 3 employees are students or may have other employment and can only work certain hours or days. The Employer generally attempts to honor such restrictions and these employees generally have a set schedule. The record further reflects that for those Status 3 employees who do not have a set schedule that the Employer's expectation is that these employees will generally work a certain number of hours each week, but their shifts may vary. Regardless of their job classification, Status 3 employees perform the same duties as full-time employees and work under the same supervision. Moreover, they are paid on the same wage scale as full-time and Status 2 part-time employees based on their dates of hire. The record does not disclose the extent to which, if at all, Status 3 employees may reject hours of work.

The Employer's on-call employees work almost exclusively in its banquet department as a result of the fluctuating demands for personnel in that department. In this regard, the record discloses that the Employer's banquet business is somewhat seasonal in nature with January through March being the traditionally slowest time of the year for such business. Holidays and the warmer months preferred for weddings provide a boost to the Employer's banquet bookings and revenues.

On-call employees are classified as servers, bartenders, and banquet bartenders. The record discloses that the only significant difference between the Employer's on-call and Status 3 employees is that the Status 3 employees have hours of work weekly and the on-call employees are simply called when they are needed. Moreover, the on-call employees may refuse the offered hours of work. The on-call employees share the same wage scale and the same supervision as the Employer's other employees. Moreover, they are eligible for the same limited benefits as are accorded to the Employer's other employees who are employed less than 30 hours a week.

It is well settled that an employee's eligibility to vote as a regular part-time employee is not determined by the fact that he or she may reject offered employment or does not receive benefits identical to others in the proposed unit. *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981); *Tri-State Transportation Co., Inc*., 289 NLRB 356, 367 (1988). Rather, the appropriate considerations to resolve whether an employee is a regular part-time employee are the extent to which the employee performs unit work and the regularity of his or her hours. *Mid-Jefferson County Hospital*, supra; *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994), citing *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992); see e.g., *Atlanta Hilton and Towers*, 273 NLRB 87 (1984)(on-call employees included in an overall hotel unit). Here, it is undisputed that the Status 3 and on-call employees in the various classifications in the proposed unit perform the same duties as the regular full-time and Status 2 part-time employees in the unit. This circumstance coupled with common supervision and a similar pay structure reflects a strong community of interest among the Employer's Status 3, on-call employees, and its regular full-time and Status 2 part-time employees. Thus, the only possible basis to exclude Status 3 and on-call employees in this matter is the regularity of their hours of work. In this connection, I note that the Board has approved the included on-call employees in an overall unit of employees in the hotel industry.

In some industries, the Board has resolved the issue of regularity of employment by applying various formulas to determine whether part-time and on-call employees have a sufficient interest in the working conditions of the unit to vote in the election. *Davison-Paxon Company, a Division of R. H. Macy & Co., Inc*., 185 NLRB 21, 24 (1970). Under the widely accepted *Davison-Paxon* formula, the Board has repeatedly held that regularity of employment is satisfied, absent special circumstances, when an employee averages at least 4 hours a week for the quarter immediately preceding the eligibility date. *Davison-Paxon*, supra; *S.S. Joachim & Anne Residence*, supra; *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). The record does not reflect, and the Employer has not cited in its brief, the existence of special circumstances in the instant matter. Accordingly, I find that application of the Board's traditional eligibility formula is appropriate in the subject case. *Davison-Paxon*, supra. I shall, therefore, include any Status 3 part-time employee and on-call employee in the unit found appropriate who has worked an average of 4 hours a week during the quarter immediately prior to the eligibility date. Use of the *Davison-Paxon* formula will serve to enfranchise the maximum number of employees in the unit based on their strong community of interests.

In reaching the above conclusion regarding the appropriate formula for eligibility I have given careful consideration to the arguments of the parties at hearing and in their briefs. The Employer suggests that I rely on its summary introduced into evidence to determine which of the on-call employees is eligible to vote in the election. However, the record discloses that the summary does not accurately reflect the hours worked by on-call employees during the quarter immediately prior to the eligibility date. Moreover, it is not clear from the record that all of the hours worked by on-call employees during the time frame presented were, in fact, included on the Employer's summary. I will not, therefore, presume to disenfranchise potentially eligible voters based on this information. The eligibility of the Status 3 part-time and on-call employees will be determined based on the established eligibility formula. Accordingly, based on the above and the record as a whole, I find that those Status 3 part-time and on-call employees employed in the proposed unit who meet the *Davison-Paxon* formula for eligibility are eligible to vote in the election.

IV. PUTATIVE SUPERVISORS - HOUSEKEEPING DEPARTMENT:

Contrary to the Petitioner, the Employer contends that Assistant Executive Housekeeper Erica McPeak and Floor Supervisor Cathy McGohan are supervisors within the meaning of Section 2(11) of the Act. McPeak and McGohan generally work five days a week from 7 a.m. or 8 a.m. to 4 p.m. McPeak currently earns $2.80 more an hour than the next highest paid housekeeping employee whose status is not in dispute. Although McGohan currently earns about $1.80 more an hour than the next highest paid undisputed housekeeping employee, the record testimony reveals that the Employer intended to reduce her pay on or about April 5 by 90 cents per hour. The record discloses that McPeak and McGohan spend most of their work time inspecting rooms to ensure that the Employer's established quality standards are being met. McPeak and McGohan use a standardized checklist provided by the Employer to review whether a room has been cleaned to the Employer's standards. If a deficiency is noted they will advise the housekeeper who is responsible for the room and the housekeeper will return to the room to correct any deficiencies to achieve the Employer's standard. McPeak and McGohan also inspect the public areas to ensure that those areas have also been properly cleaned. Executive Housekeeper Smiley has recently created a checklist for the inspection of these areas and intends to implement it shortly. Smiley testified, however, that McPeak and McGohan have been at the facility so long that they know what to look for without the benefit of a checklist. McPeak and McGohan also check the laundry on a regular basis to ensure that an adequate supply of sheets, towels, and linens are available and to ensure that the Employer's production standards are maintained. Moreover, they assist in performing linen inventory on a monthly basis. McPeak and McGohan perform room attendant duties themselves on an occasional basis when the hotel is near capacity or staffing is abnormally low. They do not attend monthly staff meetings attended by the Employer's executive staff.

McPeak has been employed at the hotel for about 26½ years. In addition to her regular duties, McPeak performs certain of Smiley's regular duties when Smiley is off work. [5]/ McPeak is Smiley's primary back up and McGohan only performs certain of Smiley's primary duties when neither Smiley nor McPeak is on the premises. In Smiley's absence, McPeak prepares or adjusts an assignment schedule based on rooms occupied. The schedule is dictated in part by the fact that certain housekeepers have permanent floors and the Employer's requirement that 26 minutes be allotted to the cleaning of each room. Additionally, Smiley's departmental practice requires that the rooms be assigned on an equal basis. Skill does not factor into room assignments. McPeak opens the housekeeping department one or two times a week and closes the department four or five times a week. Opening the department involves breaking out the rooms and telling the room attendants or housekeepers which rooms they are assigned to clean. Closing the department involves assessing the status of all the rooms, locking up the department, making sure all keys have been returned and that all of the employees have clocked out. McPeak also makes adjustments to employees' timecards as needed. For example, if an employee forgets to clock in or out for lunch she will bring the timecard to McPeak who will make a written notation on the card. The card is then forwarded to an accounting clerk who is responsible for entering the adjustment into the Employer's computer system.

Under the former employer McPeak interviewed employee applicants and her recommendations were often followed, particularly if the applicant was a former employee with whom McPeak was familiar from the employee's prior stint of employment. However, for the

[5]/ On these occasions at least one admitted supervisor is available on the premises and acts as the manager on duty.

preceding 6 months, and since the Employer purchased the facility, McPeak has not interviewed any employees. The record discloses that only one employee has been hired in the housekeeping department after the Employer began operations. Smiley has apparently interviewed at least a few applicants and McPeak was not involved in this process.

McPeak can request employees to work overtime hours, if necessary, to complete housekeeping tasks. McPeak testified that she has done so on four or five occasions since January 2001. If Smiley is present McPeak checks with her before assigning an employee to work overtime. However, if Smiley is not present McPeak will assign the overtime and explain the need for it to Smiley the following morning. If McPeak has to modify or adjust the schedule in Smiley's absence she will attempt to call in regular employees who are scheduled off for that particular shift. If McPeak is unsuccessful in getting regular employees to come in, she may contact Srass to see if Srass has additional personnel available for the day. It is not clear from the record, however, that this has ever occurred. Finally, McPeak may ask employees who are currently on duty to work additional hours to complete necessary tasks. There is again conflicting record testimony regarding whether McPeak or McGohan can mandate that employees report to work or work overtime hours, but it appears that they do not. It appears that McPeak or McGohan may release employees from work early if they have completed their tasks.

On one occasion, approximately 2 years ago and under the former owner of the hotel, McPeak sent home an employee who had argued with her. McPeak presented the matter the following day to the then head housekeeper and the former employer's human resources department. There is conflicting record testimony regarding whether McPeak sent another employee home in the summer of last year for fighting. McPeak has counseled or coached employees regarding their work. However, she has not formally disciplined employees by issuing written notations of oral warnings, written warnings, or more serious forms of discipline to them. There is also conflicting record testimony, however, regarding whether McPeak recommended that the Employer orally reprimand the two supplied employees who were later excluded by the Employer from further employment in the facility. The record discloses that only one of the Employer's regular employees has been disciplined since the Employer took over the operation and that this disciplinary action was handled by Smiley. McPeak testified that she has the authority to discipline housekeeping employees, but any such discipline must be independently reviewed by Smiley and the Employer's human resource department. McPeak testified that she has the authority to resolve disputes between employees if necessary. However, she has never needed to do so.

In addition to the duties described above, the record discloses that McGohan can adjust the housekeeping schedule by asking unscheduled employees to come into work and by scheduling employees to work overtime hours. McGohan can do so without seeking prior approval from Smiley. However, as is the case with McPeak, McGohan must call employees for work from a standard list by calling from the top down and she must schedule in accordance with the Employer's departmental restrictions. McGohan testified that she has the authority to send an employee home but she has never exercised this authority and the record does not disclose under what circumstances the authority may be exercised.

McGohan has not had any involvement in hiring or firing employees or in recommending such actions. The record discloses that McGohan participated in one or two interviews before the Employer purchased the facility but that she has not done so since that time. Moreover, McGohan has never disciplined employees or recommended that they be disciplined. McGohan

does not have the authority to promote or reward employees and there is conflicting testimony regarding whether she or McPeak can temporarily transfer a housekeeping employee outside the department under any circumstances. The work performed in the housekeeping department is routine and it is not necessary for Smiley, McPeak or McGohan to give employees additional instructions during the course of their shift.

Section 2(11) of the Act defines a supervisor as a person:

> . . . having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

It must be noted, however, that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp.,* 273 NLRB 1677, 1688 (1985). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp*., 254 NLRB 433, 437 (1981). Moreover, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.,* supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). It is also well established that the burden of proving that an individual is a supervisor rests on the party asserting supervisory status. See, *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491 (1993); *Ohio Masonic Home,* 295 NLRB 390, 393 (1989). "Accordingly, whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Based on a careful review of the record, and applying the above principles, I conclude that the Employer here has not met its burden in establishing that McGohan is a supervisor within the meaning of Section 2(11) of the Act. The record evidence discloses that McGohan does not possess any indicia of supervisory authority within the meaning of Section 2(11) of the Act. Thus, McGohan does not have the authority to hire, transfer, lay off, recall, promote, discharge, reward, discipline, or responsibly direct the work of employees or adjust their grievances, in a manner requiring the exercise of independent judgment. The record evidence regarding McGohan's authority to temporarily suspend an employee until admitted supervision can conduct an independent investigation is equivocal and she has never exercised such purported authority. Moreover, the record does not indicate whether the adversely affected employee would lose pay if the conclusion of the independent investigation was that the employee had not violated the Employer's established rules as set forth in its employee handbook. In this regard I note that it is well established that the mere exercise of a reporting function which does not automatically lead to further discipline or adverse action against an employee and which is reviewed by a conceded supervisor does not establish supervisory authority. See, *Lincoln*

Park Nursing and Convalescent Center, 318 NLRB 1160, 1162 (1995); *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992). The existence of supervisory authority with regard to McGohan is at most inconclusive and therefore I conclude that such status has not been established. *Phelps Community Medical Center*, supra. I recognize that the Sixth Circuit, the judicial circuit in which the Employer is located, places the burden of establishing that an individual whose supervisory status is in doubt on the party that has taken the position that the individual is not a supervisor. See *NLRB v. Caremore, Inc. d/b/a Alter Care of Hartville*, 129 F.3rd 365 (6th Cir. 1997). Even applying the Sixth Circuit standard, I am of the opinion that the Petitioner has rebutted any contention that McGohan is a statutory supervisor.

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in the Employer's brief, I find that McGohan is not a supervisor within the meaning of Section 2(11) Act. Accordingly, I shall include Floor Supervisor Cathy McGohan in the unit.

With regard to McPeak, the record evidence appears to show that she exercised a greater role in the disciplinary and hiring processes prior to the Employer purchasing the facility and possibly prior to the inception of Smiley's employment. Although it is asserted that McPeak's position has not significantly changed since those events, the record indicates otherwise. Certainly since the Employer began operating the hotel McPeak has not been involved in the hiring process and there is conflicting record testimony as to whether she has engaged in even the lowest level of discipline (which is nonetheless independently reviewed and investigated) Finally, I find McPeak's involvement in scheduling does not indicate Section 2(11) authority where she must follow established strictures in scheduling, including distributing the rooms evenly, ensuring that some of the room attendants receive the same floor every shift, and filling vacancies by calling in regular employees from the top down off of a list that is apparently prepared by Smiley. McPeak's involvement in assigning overtime is equivocal as to supervisory authority because there is conflicting record testimony regarding whether she can mandate overtime.

In view of the conflicting positions of the parties, the uncertainty of the impact of Smiley's position on McPeak's status, and the conflicting record evidence as to McPeak's current authority and responsibilities, I am unable to resolve her supervisory status with any degree of certainty. Thus, I shall permit McPeak to vote subject to challenge. Accordingly, I hereby instruct my agent conducting the election to challenge the ballot of Erica McPeak if she appears at the polls to vote.

V. APPROPRIATE UNIT:

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in the Employer's brief, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

> **All full-time, regular part-time and on-call bartenders, front desk associates, night auditors, drivers, housekeepers, dishwashers (sanitation aides), bellmen, servers, busers, banquet set up, banquet bartenders, banquet servers, banquet captains, maintenance employees, engineers, cooks, laundry, pantry, sales secretary, junior accounting clerks, reservation supervisor, purchasing agent, front**

office supervisor, floor supervisor (housekeeping), cashiers, and hosts, employed by the Employer at its Covington, Kentucky facility, excluding all managerial employees, and all employees furnished by supplier employers, guards and supervisors as defined in the Act.

Accordingly, I shall direct an election among the employees in such unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Section 103.20 of the Board's Rules and Regulations requires that the Employer shall post copies of the Board's official notice of election in conspicuous places at least three full working days prior to 12:01 a.m. on the day of the election. The term "working day" shall mean an entire 24 hour period excluding Saturdays, Sundays and holidays. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, and with respect to part-time and on-call employees, meet the requirements of the eligibility formula set forth in this decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Hotel Employees Restaurant Employees Union, Local 12, AFL-CIO.**

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **April 13, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **April 20, 2001**.

Dated at Cincinnati, Ohio this 6th day of April 2001.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
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